No. 76-1690

In the Supreme Court of the United States

OCTOBER TERM, 1977

H. W. BERRY, ET AL., APPELLANTS

v.

J. D. DOLES, ETC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.,
Solicitor General,

DREW S. DAYS, III,
Assistant Attorney General,

FRANK D. ALLEN, JR.,
MARK L. GROSS,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1690

H. W. BERRY, ET AL., APPELLANTS

v.

J. D. DOLES, ETC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the invitation of the Court, dated October 3, 1977.

QUESTION PRESENTED

Whether after determining that Peach County, Georgia, unlawfully effectuated a voting change which had not been precleared under Section 5 of the Voting Rights Act of 1965, the district court should have required immediate compliance with Section 5.

STATEMENT

On March 10, 1964, the State of Georgia enacted a local statute providing for a three-member Board of Commissioners of Roads and Revenue to govern Peach County, Georgia. The three members were assigned numbered posts. Post Number 1 was reserved for a resident of the City of Fort Valley; Post Number 2, for a resident of the County from outside the city; and Post Number 3 was to be elected at-large. All three posts were to be filled for four-year terms beginning at the general election of 1964. Georgia Laws, 1964, §1, p. 2627 (J.S. App. 12a).

The following year Congress enacted the Voting Rights Act of 1965, 79 Stat. 437, as amended, 42 U.S.C. 1973 *et seq.* Section 5 thereof (42 U.S.C. 1973c) bars states and political subdivisions covered by the Act from effectuating a change in voting procedures in effect on November 1, 1964, unless a three-judge panel of the United States District Court for the District of Columbia, in a declaratory judgment suit by the covered jurisdiction, has determined that the change does not have a racially discriminatory purpose or effect. In the alternative, the jurisdiction may submit the change to the Attorney General of the United States, and effectuate it if he does not interpose an objection within sixty days. 42 U.S.C. (Supp. V) 1973c. The State of Georgia and Peach County are covered jurisdictions. 30 Fed. Reg. 9897.

In 1968, Ceorgia adopted another local statute that changed the procedure for electing the Board of Commissioners in Peach County. In order to stagger the members' terms, the at-large member holding Post Number 3 was to be elected to a two-year term in 1968, and to a four-year term at subsequent elections. Georgia Laws, 1968, §2A, p. 2473 (J.S. App. 12a).

The change has never been submitted for preclearance under Section 5 either to the United States District Court for the District of Columbia or to the Attorney General. Nevertheless, it was effectuated in 1968 and 1970. As a result, instead of a single election for all three posts, elections of candidates for the city and non-city posts (Nos. 1 and 2) have been held at four-year intervals since 1968, while election of candidates for the at-large post (No. 3) have been held at four-year intervals since 1970. The last election for posts 1 and 2 was conducted in 1976, and for post 3 in 1974. The next election for post 3 will be conducted in 1978, and for posts 1 and 2 in 1980.

On August 6, 1976, four days prior to the scheduled August 10, 1976, primary for posts 1 and 2, the appellants filed this action. They requested a declaratory judgment and an injunction to restrain the election of Board members at the August 10, 1976, primary election and the scheduled November 2, 1976, general election. The complaint alleged that the 1968 Act was a change which should have been, but was not, precleared under Section 5 of the Voting Rights Act prior to its implementation (J.S. 5).

On August 9, 1976, the district court wrote to appellants' counsel, indicating that until it was demonstrated that the 1968 law was a "change," it would not set the case for hearing (J.S. App. 7a, 8a). The primary election was held as scheduled on August 10. The appellants then filed a motion renewing their request for relief and requesting the court to set aside the results of the primary election (J.S. 6). There was no response from the court, and the general election was held as scheduled on November 2, 1976 (*ibid.*).

Appellees subsequently conceded that the 1968 Act was subject to Section 5 of the Voting Rights Act (J.S. 6). On

February 28, 1977, without holding a hearing, the district court enjoined future enforcement of the 1968 Act until it has been precleared under Section 5 (J.S. App. 2a). The court refused, however, to set aside the 1976 elections, on the grounds that the changes effected by the 1968 Act were "rather technical," and that there was an "apparent lack of any discriminatory purpose or effect surrounding the use of the law in the 1976 elections" (J.S. App. 3a).

On March 23, 1977, appellants moved for reconsideration or modification of the order, asking the court to require the appellees to secure preclearance in time to qualify candidates for the 1978 election, or, if preclearance was not secured, to require that a simultaneous election for all three posts be conducted in 1978 (J.S. 7). On March 30, 1977, appellants filed their notice of appeal to this Court from the district court's February 28 order (J.S. App. 9a). On April 26, 1977, the district court denied appellants' motion for reconsideration, holding that the intervening filing of the notice of appeal deprived the court of jurisdiction. Appellants noticed an appeal to this Court from that order on May 25, 1977 (J.S. App. 11a).

ARGUMENT

1. In this case, the district court held that the 1968 Act staggering the elections of board members was a voting change subject to the preclearance requirements of Section 5 (J.S. App. 2a). The appellees do not dispute this holding (Motion to Affirm, p. 4). Nor do they dispute the finding, implicit in the district court's order, that the county has never obtained the clearance required by law. Rather, they appear to contend that the 1976 election was not affected by the 1968 change because it involved only posts 1 and 2, for which the date of the election and the term of office were the same as under the pre-1968 procedure (Motion to Affirm, pp. 3-5).

The district court, however, did not hold that there had been no change in voting procedures affecting the 1976 elections. On the contrary, it is evident that the 1976 election was affected. Prior to the change, all three board members had stood for election at the same time. The term for post 3 was staggered in 1968, thus providing that the election to that post would not occur at the same time as the election to the other two posts.[1] Electing two members to join a third who is not up for election is different than electing all three members simultaneously, because the number and combinations of possible choices the electorate must consider is changed.[2]

The 1968 Act thus changed the method of electing the entire board; accordingly, all board elections held after the implementation of the 1968 Act were in violation of

---

[1]The election for posts 1 and 2 is not like the election for the at-large seats in *Beer* v. *United States*, 425 U.S. 130. In that case the submitted change was a redistricting of the five single-member district seats on the New Orleans City Council. The redistricting of those five seats left totally unaffected the method of electing the two at-large seats, and made no change in the manner of conducting the election of the council. All seven seats, as before, would be elected at one election. The at-large seats were held to be unaffected, for purposes of Section 5, by the redistricting of the other five seats. Here, the 1968 Act affected the mode of electing the entire board.

[2]In areas where racial bloc voting is prevalent, staggering elections can in some circumstances have a tendency to isolate election contests in which a black candidate is running against a white candidate. If there is a white majority in the electorate, the staggering of the election could have a detrimental impact on black candidates. When Congress was considering the second extension of the Voting Rights Act in 1975, the Department of Justice submitted a list of all Section 5 objections theretofore. Of 168 objections, eleven were based, in whole or in part, on staggered terms. See Exhibits to testimony of Assistant Attorney General Pottinger, Hearings on S.407, S.903, S.1297, S.1409 and S.1443 before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 94th Cong., 1st Sess., pp. 598-600 (1975).

Section 5. *Reine* v. *Town of Sorrento*, M.D. La., No. 73-120, decided April 18, 1975, affirmed, 425 U.S. 946; *United States* v. *County Commission, Hale County, Alabama*, 425 F. Supp. 433 (S.D. Ala.), affirmed, 430 U.S. 924; *United States* v. *Garner*, 349 F. Supp. 1054 (N.D. Ga.).

Since the holding of the 1976 election pursuant to the 1968 Act thus necessarily would further effectuate the violation, the district court should have required the defendants promptly to comply with the requirements of Section 5. The relief entered by the court, however, not only fails to require prompt compliance, but permits the violation to continue.

The district court's order enjoined appellees "from furthering and enforcing in any respect [the 1968 change] * * * unless and until the provisions of section five * * * have been complied with" (J.S. App. 2a). But it did not direct any affirmative steps to achieve compliance. Since elections have been conducted under the non-cleared procedures since 1968, and the present incumbents were elected under the staggered procedures, the effects of the violation continue and will continue until the 1968 change is cleared, or the Commissioners' posts are subjected to the election procedures in effect on November 1, 1964, as contemplated by Section 5.

2. The district court declined to order new elections for three reasons: the "technical" nature of the violation; the decision in *Allen* v. *State Board of Elections*, 393 U.S. 544, refusing to order new elections despite a violation of Section 5; and the apparent absence of discriminatory purpose and effect (J.S. App. 2a-3a). But none of these considerations are dispositive as to the need for appropriate affirmative relief.

First, as we have shown (see J.S. 15-16), the violation significantly affected the election procedures for all three posts. Moreover, in *Allen* the Court held that Section 5 was " 'intended to reach any state enactment that altered the election law of a covered State in even a minor way.' " 393 U.S. at 566. Second, while the Court refused to set aside the election in that case, it did so only because, at the time that case was decided in 1969, the scope of Section 5's coverage presented a question of first impression, subject to "rational disagreement." 393 U.S. at 572. The Court therefore required only prospective relief. Subsequently, however, in *Perkins* v. *Matthews*, 400 U.S. 379, 395-396, the Court held that such reasoning was inapplicable to noncleared election procedures implemented two months after the decision in *Allen* was announced. Finally, it was inappropriate for the district court, in this Section 5 coverage case, to determine whether the 1968 change had a discriminatory purpose or effect. Congress expressly reserved that issue for consideration by the District Court for the District of Columbia or the Attorney General. *Connor* v. *Waller*, 421 U.S. 656; *Perkins*, *supra*, 400 U.S. at 385; *Allen*, *supra*, 393 U.S. at 555, 558-559.

3. Nevertheless, it does not follow, as appellants contend (J.S. 15-16), that, as a matter of initial relief, the 1976 elections should be set aside, or that the district court should "unstagger" the election procedure by ordering the simultaneous election of all three members in 1978. In *Perkins*, the Court held (400 U.S. at 396-397) that:

> In certain circumstances, for example, it might be appropriate to enter an order affording local officials an opportunity to seek federal approval and ordering a new election only if local officials fail to do so or if the required federal approval is not forthcoming.

We believe that this is such a case. The "staggering" of terms on a local governing body in a covered jurisdiction does not necessarily have a racially discriminatory effect; whether it does or not depends on the particular facts and circumstances (see note 2, *supra*, p. 5). And such legislation may be sincerely motivated by a purpose to provide continuity of knowledge and experience rather than a purpose to discriminate on account of race or color. These matters, however, can be determined only under one of the alternative clearance procedures of the Voting Rights Act, *i.e.*, by the District Court for the District of Columbia or the Attorney General. Accordingly, we submit that in this case, the district court should be directed to enter an order allowing the appellees a short specific time period—we suggest 30 days—within which to apply, by one procedure or the other, for clearance of the 1968 change under Section 5. If the change is cleared, no further action would be required. If it is not cleared, appellants should then be permitted to renew their request for election of all three members at the same time.

CONCLUSION

The Court should note probable jurisdiction, and dispose of the case summarily. It should affirm the judgment of the district court insofar as it found a violation of Section 5. It should reverse the judgment insofar as it denies all affirmative relief, and remand with directions that the district court allow appellees 30 days within which to apply for clearance of the 1968 change under Section 5, and thereafter enter such further orders

as are appropriate should appellees fail to act within that period or should the 1968 change not be cleared under Section 5.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

DREW S. DAYS, III,
Assistant Attorney General.

FRANK D. ALLEN, JR.,
MARK L. GROSS,
Attorneys.

JANUARY 1978.

DOJ-1978-01